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No. 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees,

STATE OF NEW JERSEY,

Intervenor.

ON APPEAL FROM THE FINAL ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF APPELLANTS

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Appeal Docketed June 19, 1980
Probable Jurisdiction Noted November 3, 1980

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QUESTIONS PRESENTED

I. Whether the vesting and nonforfeitability provisions of ERISA, Section 203(a), 29 U.S.C. §1053(a), prohibit offsets of worker's compensation benefits against the normal age and service benefits to which an employee is otherwise entitled.

II. Whether a state worker's compensation statute which prohibits such offsets is preempted by ERISA, Section 514(a), 29 U.S.C. §1144(a).

LIST OF PARTIES

This case was separately briefed but consolidated for oral argument and decision before the Third Circuit with *Buczynski v. General Motors*, Docket 79-1668 (3d Cir., 1980). The parties in this case are: Joseph Alessi, Raymond Buisson, Stephen Michalski, Charles Repka, and T. Edward White, plaintiffs-appellants. Helen Vogt was a party to the Third Circuit proceedings but her claim was voluntarily dismissed on July 14, 1980. Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan were defendants-appellees and the State of New Jersey intervened. The parties in *Buczynski*, with which this case has been consolidated, are Henry Buczynski and Alex Borusovic and a certified class consisting of "those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at

the time of their retirement, were employed by General Motors Corporation in New Jersey", plaintiffs-appellees. The defendant-appellant in the consolidated case is the General Motors Corporation. The State of New Jersey intervened in *Buczynski* as well. *Amici curiae* at the Third Circuit included the Grey Panthers and individual employees of several steel companies: Carmen Gargon, Frank Doumont, Robert Milanovich, Wayne Banks, Michael Barna, and Paul Miller (participants in a consolidated action with similar issues in a case now pending before the Third Circuit), supporting plaintiffs-appellees. Shenango, Inc., U.S. Steel, Crucible, Inc., Jones & Laughlin Steel, Mesta Machine Company, Pullman-Standard, Wheeling-Pittsburgh Steel, and the United States filed briefs on behalf of the defendant-appellants.

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CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 616 F.2d 1238 and is reprinted in the Jurisdictional Statement filed herein at page 10a. The opinion of the United States District Court for the District of N.J. in this case is unpublished but is reprinted in the Jurisdictional Statement at page 1a. The district court opinion in the companion case of *Buczynski v. General Motors Corporation* is published at 456 F. Supp. 867.

JURISDICTIONAL BASIS

This appeal is from the final judgment decided and filed by the United States Court of Appeals for the Third Circuit on February 15, 1980 holding New Jersey Statutes Annotated 34:15-29 unconstitutional under the Supremacy Clause because the same is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* That decision also held that the offset of retirement pension benefits from a worker's compensation judgment is not unlawful under ERISA. (Petition for Rehearing Denied March 19, 1980).

The Supreme Court of the United States has jurisdiction to review, by direct appeal, the opinion complained of by the provisions of 28 U.S.C. §1254(2). Notice of Appeal was timely filed with the Clerk of the United States Court of Appeals for the Third Circuit on April 25, 1980, within the ninety (90) days permitted by 28 U.S.C. §2101 (c). Thereafter, Appellant's Jurisdictional Statement, Appearance and Docket Fees were filed and the appeal duly docketed on June 10, 1980. Probable jurisdiction was noted on November 3, 1980 and the appeal was consoli-

dated with *Buczynski v. The General Motors Corporation*, No. 80-193 in which the Court had granted a petition for writ of *certiorari*.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is Article VI, cl. 2 of the Constitution of the United States. The statutes involved are 26 U.S.C. §401(a)(5); 29 U.S.C. §1002(19); 29 U.S.C. §1002(22); 29 U.S.C. §1053(a); 29 U.S.C. §1056(b); 29 U.S.C. §1144; 29 U.S.C. §1202(c) and N.J.S.A. 34:15-29. The regulation involved is 26 C.F.R. 1.411(a)-4(a). The rulings involved are Revenue Ruling 78-178 and Revenue Ruling 68-243. These provisions are reproduced in the appendix.

STATEMENT OF THE CASE

The plaintiffs are former employees of the defendant, Raybestos Manhattan, Inc. (JA15a, ¶ 1).[1] Each attained normal retirement age, retired and began receiving a pension under the terms of the Raybestos Manhattan Inc. Employee Retirement Plan ("the Plan") based on their long service with the Company in its asbestos manufacturing facility (JA15a, ¶3).[2] Subsequently, each of the plaintiffs obtained a New Jersey worker's compensation judgment against the Company—not the Plan or a governmental agency—for job-caused lung or other disabilities (JA16a-17a,

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1. References to the Joint Appendix will be denominated "JA. —."

2. The years of service at retirement were: Alessi, 32; Buisson, 32; Michalski, 31; Repka, 39; White, 32 (JA20, ¶2).

¶¶10, 11). The judgments were calculated on a statutory compensation schedule without reference to wage loss.

Under the language in the Plan requiring the offset of a variety of benefits,[3] the employees' pension benefits were suspended and will not resume for any plaintiff until his lost pension benefits equal the worker's compensation payments received from the Company.

All plaintiffs have lost their entire monthly pensions—Alessi and Repka, $173 each; Buisson, $154; Michalski, $170; and White, $158 (JA17a, 19a). In each case, the lost monthly benefits have been permanently and irrevocably lost because their pension entitlements will cease at death and the duration of their pension payments will not be extended by the worker's compensation award.[4]

Plaintiffs objected to this forfeiture of their normal retirement benefits, citing a provision of the New Jersey worker's compensation law specifically outlawing such practices (JA16a-17a, ¶¶9, 13).[5] Defendants nonetheless refused to revoke the suspension of benefits (JA17a, ¶14).

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3. The Plan states at Article VI, §4(b), that (JA.16a, ¶8):

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

4. It is, in fact, more likely that the plaintiffs' long term exposure to asbestos in the work environment will result in an "actuarially significant" shortening of their life expectancies.

5. "The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be offset against employee's retirement pension benefits or payments." Chapter 156 of the Laws of 1977, amending N.J.S.A. 34:15-29. None of the plaintiffs herein is receiving a disability pension.

On February 1, 1978, plaintiffs filed a class action complaint in the Superior Court of New Jersey, Chancery Division. The case was removed to the United States District Court for the District of New Jersey on March 3, 1978 (JA6a-10a). On December 28, 1978, the parties filed a Statement of Stipulated Facts (JA15a-17a). The Court, after trial on Stipulated Facts, found for plaintiffs in a Letter Opinion dated February 15, 1979, granting relief in the form of damages and an injunction barring further offsets. In so doing, the Court held that N.J.S.A. 34:15-29 was not pre-empted by ERISA, 29 U.S.C. 1144(a), and that ERISA itself made such offsets impermissible forfeitures, 29 U.S.C. 1053(a). An Order in conformity with the Court's opinion was entered on March 1, 1979 (JA18a-19a).

Defendants filed a Notice of Appeal on March 19, 1979. The Appeal was docketed on April 30, 1979 in the United States Court of Appeals for the Third Circuit. Orders granting stay of payment of damages and approving *supersedeas* bond and granting stay of injunctive relief pending Appeal were entered on March 21, 1979 and May 13, 1979, respectively.

Briefs were submitted to the Court by both parties and by the Attorney General of New Jersey, who sought and was granted permission to intervene. At the time of oral argument, on January 8, 1980, the case was consolidated with the appeal of *Buczynski v. General Motors Corporation,* 456 F. Supp. 867 (1978).

On February 15, 1980, the Court of Appeals rendered its Opinion, reversing the decisions of the District Courts in this case and in *Buczynski,* 616 F.2d 1238 (3d Cir., 1980). On February 27, 1980, the plaintiffs filed a Petition for Rehearing En Banc (JA20a). On March 19, 1980, the petition was denied and judgment was entered (JA23a).

Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Court of Appeals on April 25, 1980, together with a request to certify and transmit the entire record to the Supreme Court.[6] On November 3, 1980, the Supreme Court noted probable jurisdiction and consolidated the case with *Buczynski v. General Motors Corp.*, No. 80-193, in which the Court simultaneously granted *certiorari*.

SUMMARY OF ARGUMENT

Sections 203(a) and 3(19) of ERISA, 29 U.S.C. §1053(a) and 1002(19), prohibit the offset of worker's compensation against retirement pensions such as the offset contained in the defendant's Pension Plan. Under those sections, a Pension Plan must provide that an employee's right to his normal retirement benefits is non-forfeitable and a non-forfeitable right must be unconditional and legally enforceable against the plan. The worker's compensation offset provided in defendant's Pension Plan imposes a condition on an employee's right to normal retirement benefits which renders an employee's claim forfeitable within the meaning of Section 1002(19) of ERISA and therefore violates Section 1053(a) of ERISA.

The statutory requirements accord with Congressional policy, intended to reform the law of pensions, to assure that earned normal service pensions, as a form of deferred employee wages, are protected against a loss for any reason.

The Court of Appeals erroneously relied on a Treasury regulation, which it deemed "legislative," on certain reve-

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6. Plaintiff Helen Vogt subsequently withdrew from the case, and an order of dismissal as to her claim was entered on July 14, 1980.

nue rulings, and on an alleged analogy to the integration of Social Security benefits.

Such administrative interpretations are in fact not "legislative," essentially pre-date ERISA, misconceive the nature of worker's compensation, are largely inapposite, and violate the Act. The purported Social Security analogy is inapt, and reflects a misconception of the dissimilar nature and statutory treatment both of Social Security benefits and worker's compensation.

Finally, the New Jersey worker's compensation statute, which prohibits worker's compensation setoffs, is not preempted by ERISA, which expressly preserves state regulation of worker's compensation.

ARGUMENT

I. The provisions of the defendant's pension plan which offset a participant's normal service retirement benefits by the amount of worker's compensation he receives violate the vesting and nonforfeitability provisions of Section 203(a) and 3(19) of ERISA, 29 U.S.C. §§1053(a) and 1002(19).

A. ***The clear and unambiguous language of ERISA provides that an employee's rights to a vested retirement pension are not subject to any forfeiture or offset except those specifically delineated in Section 203(a)(3) of ERISA.***

> "With the limited exceptions noted above, *no rights, once they are required to be vested, may be lost by* the employee under any circumstances . . ." *S. Rept. 93-383* (Finance Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4890, 4934; *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4725-4726 (emphasis supplied).

Section 203(a) of ERISA plainly establishes that once a plan participant attains normal retirement age, he has *at that moment* a vested, "non-forfeitable" right to his normal retirement benefits derived from employer contributions.

Section 203(a) pertinently provides:

> "Section 203. (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is *non-forfeitable upon the attainment of normal retirement age* and in addition shall satisfy the requirements of paragraphs . . . (2) of this subsection." (Emphasis added).[7]

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7. The "paragraphs (2)" reference is to an independent requirement, *Caterpillar Tractor v. Comm'r. of Internal Revenue*,

His "non-forfeitable" right is defined by Section 3(19) of the Act, 29 U.S.C. §1002(19), as follows:

> "(19) The term 'nonforfeitable' . . . means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional*, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in Section 203(a)(3)." (Emphasis supplied).

Section 203(a) and 3(19) thus establish in the clearest possible language the principle that an employee's vested pension rights cannot be forfeited or made conditional for any reason except those expressly permitted by the Section itself.[8] Such right to a "benefit . . . arising from . . . ser-

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72 T.C. No. 89, 1979 C.C.H. T.C. Reg. Dec. ¶36, 316, 260 B.N.A. Pens. Rptr. D-6 (1979), that a plan must "in addition" provide for an employee's interest in his "accrued benefit" to become nonforfeitable after he completes a period of service not in excess of those allowed under one of the three alternative vesting schedules prescribed in subsection 203(a)(2), 29 U.S.C. §1053(a)(2). The IRS can require even *shorter* periods for vesting if the plan becomes "discriminatory" in operation by favoring officers, highly compensated employees, etc. *H.R. Rept. 93-807* (Ways and Means Committee), reprinted in [1974] U.S. Code Cong. & Adm. News, at 4670, 4689. But IRS cannot allow the plan to use a longer vesting period than these statutory periods in §203(a)(2) even if the plan would not thereby be "discriminatory" in operation. This is a significant change from prior law, which did not generally require any vesting whatsoever until an employee remained in actual service to retirement age. *U.S. v. Hill*, 398 F.2d 383 (8th Cir., 1968); *H.R. Rept.* 93-807, *supra*, at 4719.

8. Section 203(a)(3) creates five "exceptions," not here pertinent, to the nonforfeitability of an employee's accrued benefits,

vice," is a deferred wage and cannot be conditioned upon fulfillment of *any* further pension plan obligation.

The provision of the Raybestos Plan for the offset of worker's compensation benefits against the normal service-based retirement benefit due these plaintiffs [9] erects such a prohibited condition to the receipt of full vested benefits by participating employees. It allows the Plan administrator, subsequent to the vesting of all benefits accrued by an employee under the Plan, and indeed after his retirement, to reduce the amount of retirement benefits it will pay him by the amount of *worker's compensation* payments the participant receives from the Company. Thus, the only way a plan participant can receive the full amount of benefits he has already independently earned under the Plan—*i.e.*, the benefits to the receipt of which he has an unconditional nonforfeitable right—is to forbear from bringing even a claim against the Company for benefits to which he is

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which relate generally to (1) the employee's death (unless a joint and survivor annuity is to be provided); (2) the employee's withdrawal of any part of his own mandatory contributions where he is less than 50 percent vested (unless the employee repays the withdrawn contributions with interest); (3) the plan's "cash out" of an employee's accrued benefit; (4) the suspension of payment of benefits attributable to employer contributions during a period in which the employee is re-employed by the same employer under the same plan; and (5) accrued benefit reductions for one plan year by plan amendment approved by the Secretary of Labor, and only to forestall substantial economic peril to the viability of the plan. (These exceptions were also added to IRC, §411, "Minimum Vesting Standards" for qualification of a trust).

9. This case does not present issues concerning the non-forfeitability of early retirement benefits or disability pensions. These involve more complex legal and actuarial analysis in order to differentiate between the forfeitable and non-forfeitable aspects or components of the total benefits payable from the plan. ERISA §§ 203(a), 206(a), 3(22); 29 U.S.C. 1053(a), 1056(a), 1002(22).

independently entitled under the New Jersey Workers Compensation Act.

Should a participating employee suffer the fortuitous event of a compensable on-the-job injury, he must face the brutal economic reality of loss of anticipated retirement benefits solely by virtue of the Plan's worker's compensation offset provisions. Not only is he denied even one additional penny to compensate him for the financial, physical, and emotional loss he endures from his disability, but instead, any worker's compensation payments he receives to *compensate* him for his loss of earnings (including his inability to earn further retirement benefits by further work with the same or another employer)[10] and earnings capacity, directly reduce the amount of money he would otherwise receive as pension benefits earned through long years of employment service to the Company and which he anticipated would be available for his financial security after retirement.

The obvious, direct and chilling result is that the employee who receives worker's compensation for a personal injury suffers a corresponding dollar-for-dollar loss in his anticipated post-retirement financial security. And if the compensatory payments are large enough, a complete forfeiture of his pension benefits is effected, as was the case with these plaintiffs, simply because they suffered bodily injury in the workplace.

The Act is clear—*no* plan provision may any longer operate to reduce a participant's benefit once vested—re-

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10. Employees do not normally receive additional pension credits after normal retirement age nor even for periods of absence from work due to compensable injury even prior to that age, 29 C.F.R. §860.120(f)(iv)(B)(3); 29 C.F.R. §2530.200b-2(a)(2)(ii).

gardless of the provision's pre-Act standing and even if it is denominated an "offset" rather than a "forfeiture", unless it is expressly permitted; once vested, *all* benefits are to be preserved.

Judicial authority to date supports these views.

In the only case to reach this Court on the interpretation of Section 203 of ERISA, the Court recognized the importance and sweeping nature of the nonforfeitability provisions of ERISA. *Nachman Corporation v. Pension Benefit Guaranty Corp.*, – U.S. –, 100 S. Ct. 1723, 64 L.Ed.2d 354 (May 12, 1980). In *Nachman*, this Court stated that *any provision* in a plan which sanctions a forfeiture of vested benefits other than those enumerated, is made illegal by ERISA. The majority observed:

> "Section 203(a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in §203(a)(2), as not subject to forfeiture. *A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date.*" 100 S. Ct. 1728, No. 10. (Emphasis supplied).

In interpreting ERISA, the majority in *Nachman* looked to the legislative history and found that it was one of Congress' central purposes to make ". . . sure that if a worker has been promised a defined pension benefit upon retirement–and if he has fulfilled whatever conditions are required to obtain a vested benefit–that he actually receive it." 100 S. Ct. at 1733.

The dissent equally noted that the definition of the term nonforfeitability precluded any "conditions subsequent" to the receipt of pension benefits. Justice Stewart referred to the comments of Representative Perkins:

> "As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definitions of 'nonforfeitable' almost identical to that contained in 29 U.S.C. §1002(19) as finally enacted: 'The definition of the term "nonforfeitable" is intended to preclude *any* conditions to receipt of vested benefits other than those noted in the definition.' II Leg. Hist. 3306 (statement of Rep. Perkins)" 100 S. Ct. at 1741, n.9 [11] (emphasis by Stewart, J.).

Thus the only expressions of opinion by this Court as to the meaning of Sections 203 and 3(19) of ERISA—albeit in the different context of nonforfeitability concepts under Title IV of ERISA—demonstrate that the language makes illegal any provision which purports to sanction a forfeiture of vested benefits by *any* reason other than those listed in Section 203(a)(3).

Such other reasons are not excused merely because they are called "suspensions" or "offsets" rather than "forfeitures." As Judge Friendly reasoned in *Riley v. M.E.B.A. Pension Trust*, 570 F.2d 406, 409 (2nd Cir., 1977), in response to a plan's claim that its suspension of benefits pursuant to an overbroad application of a re-employment suspension clause (see ERISA §203(a)(3)(B), 29 U.S.C. §1053(a)(3)(B) was not illegal:

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11. The dissent also noted that insofar as PBGC's own definition of "nonforfeitable" departs from Section 1002(19) of ERISA, it must be rejected. 100 S. Ct. 1739, n. 5.

"When § 203(a)(3)(B) provides that certain kinds of suspensions [of pension benefits] are not forfeitures, it necessarily implies that those not falling within its terms are. . . . If the language of the statute left any doubt that Riley is entitled to prevail unless the conditions of §203(a)(3)(B)(ii) have been met, this would be removed by the portions of the Conference Report quoted in the margins.°

° *Permitted forfeitures of vested rights.*

Under the conference substitute, except as outlined below, an employee's rights, once vested, are not to be forfeitable for any reason. An employee's rights to benefits attributable to his own contributions may never be forfeited.

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House Conference Report No. 93-1280, 93d Cong., 2d Sess. 1974, reproduced in 3 [1974] U.S. Code Cong. & Ad. News 5038, 5052-53."

The Court in *Riley* further observed that the language of ERISA required an expansive reading of the term "nonforfeitable" since it was specifically and broadly defined in Section 3(19) of ERISA, 29 U.S.C. §1002(19). The Court ruled that:

"As regards employer contributions, the employee's rights must be nonforfeitable if he has met certain requirements relating to age and years of service which Riley concededly has done. Section 3(19), 29 U.S.C. §1002(19), defines 'nonforfeitable' as meaning, among other things, a claim 'which is unconditional and which is legally enforceable against the plan.' *The provision* of Article II A, §13, quoted above, fn. 2, *places a condition on Riley's claim to the*

monthly benefits to which he otherwise would be entitled and makes his claim legally unenforceable against the Plan; it thus constitutes a forfeiture within the meaning of ERISA." (emphasis added) *Id.* at 409.

On like reasoning, formerly acceptable "bad boy" clauses have been disapproved. *Winer v. Edison Brothers Stores Pension Plan,* 593 F.2d 307 (8th Cir., 1979); *Amory v. Boyden Associates,* 434 F. Supp. 671 (S.D.N.Y. 1976); *Lewis v. Merrill Lynch, Pierce, Fenner and Smith,* 431 F. Supp. 271 (E.D. Pa., 1977) notwithstanding approval of such clauses by the IRS in a pre-ERISA ruling, see Revenue Ruling 71-92, IRB 71-7 ("misconduct" forfeiture provision does not render plan discriminatory even though "misconduct" not defined so long as evenly applied).

The same rationale invalidates the worker's compensation offset in this case, again, notwithstanding supposed prior IRS approval. As explained by Judge Pratt in *Utility Workers v. Consumers Power,* 453 F. Supp. 447, 456 (E.D. Mich., 1978), appeal pending, No. 78-1402 (6th Cir.), in the course of reversing his own prior decision in *Carlson v. Bundy Manufacturing Corporation,* Civ. No. 6-72274 (E.D. Mich., 1977), approving such offsets:

"As previously indicated, Congress has set forth a broad rule of non-forfeitability and then provided certain limited exceptions to it. In *Riley* and *Keller* [v. *Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005 (ND Ohio, 1976)] this Congressional language has been construed in favor of workers. The Court is persuaded that Congress did not intend to exempt workmen's compensation payments from the non-forfeitability requirement of ERISA. Just as in the *Riley* case, the workmen's compensation offset pro-

vision of this pension plan places a condition on the plaintiff's claim to monthly benefits which makes that claim legally unenforceable against the plan. It therefore constitutes a forfeiture as that term is used in ERISA. The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language."

Accord: Strong v. Bucyrus-Erie, 472 F. Supp. 1089 (E.D. Wisc., 1980), appeal pending, No. 80-1755 (7th Cir.).

A separate series of decisions in District Courts all within the Third Circuit had also invalidated worker's compensation offsets against normal pension benefits before the decision below. See, *Carpenter Technology Corporation v. Boyton,* Opinion of December 12, 1979 (Jurisdictional Statement, Appx. G) modified, March 7, 1980 Civ. No. 78-1415, (D. N.J.), and the lower court decisions in the consolidated cases herein, *Buczynski v. General Motors,* 456 F. Supp. 867 (D. N.J. 1978) *recons. den.,* 464 F. Supp. 133 (D. N.J. 1978); *Alessi v. Raybestos-Manhattan,* Civ. No. 78-0434 (D. N.J. 1979).

Each of the plaintiffs will under defendant's argument and the ruling below thus suffer a total and irreversible loss of the monthly benefits he would otherwise receive simply because he contracted an illness or injury at the workplace and used his statutory remedy to worker's compensation. The language of ERISA plainly prohibits that result.[12]

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12. The complete forfeiture of benefits on these facts highlights the error in the attempts of defendants (in the papers opposing review by this Court) to use this Court's language in *Nachman Corporation v. Pension Benefit Guaranty Corporation,*

B. *The purposes and legislative history of ERISA confirm the plain language of the act that an employee's deferred wages represented by his pension benefits are protected from loss under a Worker's Compensation offset provision.*

ERISA's policies are based on the premise, grounded in modern economic fact, "that promised pension benefits are in the form of a . . . deferred wage," *H.R. Rept.* 93-533 (Education and Labor Comm.), reprinted in [1974]

— U.S. —, 100 S. Ct. 1723, 64 L.Ed.2d 354 (1980), out of context to carry out their theme that so-called "integration" of any sort or benefit is acceptable notwithstanding ERISA. Accepting the proposition that the term "forfeiture" ". . . normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights . . .," *Nachman Corporation v. Pension Benefit Guaranty Corporation, supra,* 100 S. Ct. at 1732, it is nonetheless apparent that the plaintiffs have in fact suffered a complete and irrevocable loss of their pension benefits because of a single event—a claim for worker's compensation upon discovery of a work-related disability. Defendants cite the Court's language suggesting that "nonforfeitability" describes ". . . the quality of the participant's right to a pension rather than a limit on the amount he might collect." *Id.* In the plan termination context of *Nachman*, this language plainly refers to the contrast between the necessarily unconditional claim against the legally separate pension trust, ERISA §§402, 502(d)(2), 29 U.S.C. 1102, 1132(d)(2), and the entirely different pension contract arising against the employer directly for the full amount of a promised pension but for clauses limiting the employer's liability such as were involved in *Nachman*. See, e.g., *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 182 n. 20 (1971); *Hoefel v. Atlas Tack Corporation*, 581 F.2d 1 (1st Cir., 1978), *cert den sub nom, Atlas Tack v. Mahoney*, 440 U.S. 913 (1979); *Matter of Erie Lackawanna Ry Co.*, 548 F.2d 621 (6th Cir. 1977), *Rochester Corporation v. Rochester*, 450 F.2d 118 (4th Cir., 1971); *Hurd v. Illinois Bell Telephone Company*, 234 F.2d 942 (7th Cir., 1956); *Stopford v. Boonton Molding Co.*, 56 N.J. 169, 265 A.2d 657 (1970); *Schlosser v. Allis-Chalmers*, 86 Wisc. 2d 226, 271 N.W.2d 879 (1978).

U.S. Code Cong. & Adm. News at 4639, 4651,[13] and that the pension trust which provides such benefits is effectively the property of employees rather than the employer[14]—

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13. The deferred wage analysis and its history is a consistent theme in ERISA's legislative history. As the Senate Labor Committee noted:

> ". . . [D]uring World War II and the Korean conflict, . . . [i]ncreases in fringe and retirement benefits . . . became a means of compensating workers in lieu of increased wages, thus making pensions a form of deferred wages."

S. Rept. 93-127 (Labor and Public Welfare Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4838, 4839. See also: *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4640 (describing pensions as the "deferred component of compensation"); *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4714 (acknowledging that employees must often elect between "current compensation or some other form of [current] benefits to coverage under a pension plan"). And see *Inland Steel v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. den.* 336 U.S. 960 (1949).

14. The economic analysis of the operation of a pension trust underlying the Congressional premise is simple. The employee defers a modest portion of wages directly to a joint pension trust which is (at least theoretically) capable of earning far more in investment return over his worklife than an individual's bank account would. For the employer's part, he ends up effectively borrowing from the current wages otherwise due an employee in exchange for a promise to pay both the deferred wages and interest in the distant future, in the expectation that investment growth in the pension trust in the interim will fund much of that promise. Weiss, "Private Pensions: The Impact of ERISA on the Growth of Retirement Funds," in *Funding Pensions: Issues and Complications for Financial Markets* (Fed. Reserve Bk. of Boston, Conf. Series No. 16), pp. 141-144 (1976). Support for the deferred wage concept of pensions can also be garnered from numerous other sources. Bernstein, *The Future of Private Pensions*, 118-121 (1965); McGill, *Fulfilling Pension Expectations*, 164-165 (1962). A recent paper by Schiller and Weiss (of American University and Joint Committee on Taxation, U.S. Congress), *Pensions and Wages: A Test For Equalizing Differences* (Rev. November, 1978, funded by the U.S. Administration on Aging and the U.S. Dept. of Labor and University of Maryland's Computer Science Center), empirically confirms the authors' hypothesis that, "More generous

a policy conclusion evidenced by the very title of the statute: the *Employee* Retirement Income Security Act.

It was Congressional concern that prevailing legal concepts were significantly out of touch with reality both as to the nature and the content of the promises made to employees, which sparked the massive reform in ERISA. The Act is designed to conform the law to economic reality in order to "assure that workers now covered by pension plans get their expected benefits." *H.R. Rept. 93-533* (Education and Labor Comm.), Supplemental Views of Reps. Quie, Ashbrook, Erlenborn, Eshleman and Hansen, reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4666.

The result was a broad remedial statute in the classic sense, entitled to a liberal interpretation to accomplish its purposes. In the words of the Senate itself, "[i]t is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs." S. *Rept. 93-127* (Labor and Public Welfare Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News, at 4838, 4854.

The issue, as both the House Education and Labor Committee and the Senate Labor and Public Welfare Committee viewed it, was "whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits they have earned as deferred compensation and which have been placed for them in a fund for retirement purposes." S. *Rept. 93-127* (Labor and Public Welfare Comm.), reprinted in [1974] U.S. Code

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pension provisions are offset by lower wage rates, i.e., that equalizing differences operate across the different dimensions of total compensation." (Abstract). In effect, say the authors, "workers pay for their own pensions by accepting lower wages." (Id., 1).

Cong. & Adm. News at 4838, 4845; see also *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4644-4645. Congressional analysis focused on two crucial aspects of actual perceptions in modern life which seemed to be largely unrecognized in the common law. The first was the content of the employee's perception of the promise made to him. The second was the deferred wage concept itself. Congress was concerned that the widening gulf between law and reality was undermining employee confidence in the private pension system as a means of saving for old age so as to undermine one of the principal sources of saving and investment capital to fuel the economy's growth.[15]

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15. Congress estimated the size of private pension fund assets at $150,000,000,000 in 1973 with anticipated growth to $225,000,000,000 by 1980. *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4641; *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News, at 4670, 4672. Employee savings represented by both total funded *and* unfunded vested liabilities are substantially above these amounts.

Senator Bentsen of Texas, a major supporter of ERISA and a businessman of long experience, drew direct analogy in floor debate between the function of ERISA's plan termination insurance provisions and other programs for maintaining confidence in savings and investment vehicles, such as the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. U.S. Senate Proceedings, August 22, 1974, reprinted from the Congressional Record, in III Legislative History of the Employee Retirement Income Security Act, at 4794-4795.

These massive amounts contrast markedly with the relatively minor national aggregate of worker's compensation offsets and offer a ready explanation as to why Congress did not feel the need to deal with such offsets expressly. The total financial impact on *every* pension plan in the country of outlawing such offsets was recently analyzed in a report prepared for the Department of Labor as follows:

(1) The estimated number of affected pension plans is 7,200 or 8.5% of defined benefit plans.

Senator Javits, probably ERISA's chief mentor, stated the nature of the practical problems in forceful terms on the floor:

> "The fact of the matter is that the private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker 'works' for that pension the same way he 'works' for his wages or salary and when he does not get it or some reasonable portion of it, he is angry, frustrated, and ultimately convinced that he has been robbed of a material recognition that was due him."

U.S. Senate Proceedings, September 18, 1973, reprinted from the Congressional Record, in II Legislative History of Employee Retirement Income Security Act, at 1579, 1609.

One source of pension benefit losses which contributed to the perception (no matter how technically correct) by

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(2) The estimated number of affected claimants is 2,000 per annum or 0.006% of the 32,237,000 participants in defined benefit plans.

(3) The estimated average benefits to affected participants would be approximately $225 per month under plans with immediate benefit provisions, and about $340 per month under plans with deferred benefits which permit benefit accrual while disabled.

(4) The estimated increase in annual pension plan contributions ranges from $31,700,000 to $34,100,000 or only 0.22% to 0.24% of current pension costs.

Hayes Associates, Analysis of Pension Plans/Worker's Compensation Offsets: Final Report, April 13, 1979, Contract No. J-9-P-7-0065, p. iii. The analysis was prepared in connection with a pending legislative proposal to outlaw in absolutely explicit terms *all* worker's compensation offsets against any type of pension benefit.

employees that they were, in Senator Javits' words, being "robbed," was the application of technical limitations or conditions buried in a pension trust document and incomprehensible to (and, at times, actually even hidden from)[16] the average employee, who had perceived the promise made to him solely in terms of expansive statements made in employer benefit brochures or in union meetings or similarly, about marvelous pension benefits.[17] As both labor committees of Congress observed:

> "In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording . . . ."

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16. Congress expressly noted that "owing to the lack of employee information" regarding employee benefit plans "it is therefore desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made. . . ." ERISA, §2(a), 29 U.S.C. 1001(a). Congress addressed both the problems of concealed documents and the overly glowing nature of company benefit brochures by enacting the reporting and disclosure requirements of Title I, Subtitle B, Part I of ERISA, 29 U.S.C. 1021, *et seq.* As a historic side-note, it may be observed that at least one court had begun to deal with this same problem by refusing to consider undisclosed plan terms as part of the employee's "contract" with the employer, *Chapin v. Fairchild Camera & Instrument*, 31 Cal. App. 3d 192, 107 Cal. Rptr. 111, 114 and n.6 (1973).

17. The retiree, subjected to the offsets involved in these cases, of course only discovers these technical terms after his retirement and after his departure from the workplace and collective bargaining unit. Cf. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

S. Rept. 93-127 (Labor and Public Welfare Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 4838, 4841-4842. See further 4865. *H.R. Rept. 93-533* (Education and Labor Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4643. See further 4650. As the Senate Labor Committee stated, the issue was "whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives," *S. Rept. 93-127* (Labor and Public Welfare Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 4838.

The result was ERISA's nonforfeitability requirements, to emphasize that the pension was earned by the employee's service and rightfully belonged to him on that basis alone, without further conditions or obligation to his employer or anyone else.

Congress thus declared it to be the public policy of the United States to improve "the equitable character of such [employee benefit] plans by requiring them to vest the accrued benefits of employees with significant periods of service . . ." ERISA §2(c), 29 U.S.C. §1001(c). To remedy the fact, found by Congress in §2(a), 29 U.S.C. §1001(a), that "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting in such plans," Congress ordained in Section 203(a) that each pension plan provide that an employee's right to his normal retirement benefit vest upon attainment of normal retirement age and in addition satisfy one of the three minimum vesting schedules under which the rights to an accrued benefit become nonforfeitable at once after a certain period of service or after a period of service and attainment of a certain age.

Congress, in drafting this general rule of vesting and nonforfeitability plainly, intended to prohibit *any* provi-

sion which reduced the amount of pension benefits a worker expected to have upon his retirement.

The House Ways and Means Committee and Senate Finance Committee reported that ERISA was designed in part "to make sure . . . that those who do participate in such plans . . . do not lose their benefits as a result of unduly restrictive forfeiture provisions . . . ," *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4671; *S. Rept. 93-383* (Finance Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4890, 4898. And the House Labor Committee expressed its "[c]oncern for loss of benefits by workers after long years of labor through circumstances beyond their control." *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4643.

A plan provision causing the loss of pension benefits already earned through long years of service simply because the employee is injured or maimed on the job is plainly an example of precisely the type of circumstance "beyond a worker's control" which causes him to feel "robbed" and which Congress intended to prohibit.

C. *The conclusions reached below are erroneous*

The Court of Appeals accepted defendants' arguments attempting to justify the worker's compensation offset notwithstanding the clear and unequivocal language, history and purpose of Section 203(a) and 3(19) of ERISA, 29 U.S.C. 1053(a) and 1002(19). In the final analysis, defendants and intervening defendant rely on semantic distinctions, tautological analyses, the pre-ERISA status quo and their own self-serving regulations to justify abuses

forbidden by ERISA and which Congress intended to eliminate.

The court seemingly based its decision on conclusions that: (1) the supposedly dispositive regulation was "legislative" rather than "interpretive" in character; (2) the regulation and a pre-ERISA ruling formally and rationally allowed unlimited offsets of worker's compensation benefits against normal service-related pension benefits, and/or (3) at least, that the regulation was not sufficiently contrary to law or arbitrary to be invalidated notwithstanding its supposed "legislative" status because the conceded legality of offsets of Social Security old-age benefits indicated that "it cannot be true that all reductions in benefits are necessarily forfeitures", *Buczynski v. General Motors, supra,* 616 F.2d at 1246. The court never reached the point of affirmatively explaining why worker's compensation offsets against normal retirement benefits are or should be permitted by the statute.

1. The Treasury Regulation is not "legislative" in character.

The Third Circuit began its analysis by concluding that the worker's compensation offset was "expressly authorized" by Treasury Regulation Section 1.411(a)-4(a); that that Regulation, like *all* the Treasury regulations under ERISA, or virtually every regulation on pensions was "legislative" not "interpretative" in character by virtue of ERISA Section 3002(c), 29 U.S.C. 1202(c),[18] and, there-

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18. The section provides:

(c) Regulations proscribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards

fore, virtually immune from judicial review and that accordingly, to sustain the Regulation, " 'We need only determine . . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole.' " [19] Indeed, the judicial opportunity for review is so limited, said the Court, that "a legislative regulation [may] be invalidated only for a clear and manifest conflict with the governing statute," *Buczynski v. General Motors, supra,* 616 F.2d at 1243, a conflict "*so* contrary to ERISA that it cannot stand." *Id.,* 616 F.2d at 1247 (emphasis added).

Little wonder, then, that the Third Circuit reached the conclusion that it did, having given almost conclusive deference to the Treasury Regulation—despite the facts, discussed below, that this new "regulation" does *not* "expressly authorize" a worker's compensation offset and that it violates the anti-forfeitability provisions of the statute, ERISA Section 203(a), 29 U.S.C. 1053(a) (1974), and that assertions to the contrary have no valid basis in I.R.S. regulations and rulings.

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set forth in parts 2 and 3 of subtitle B of subchapter 1 of this chapter which include 29 USC §1053(a). Except as otherwise provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

Portions of §411 of the Tax Code, 26 U.S.C. §411, within the jurisdiction of the IRS are, in fact, complete parallels of ERISA, §203, 29 U.S.C. §1053 within the jurisdiction of the Department of Labor.

19. Judge Garth relied on the conclusion in his prior opinion in *Baker v. Otis Elevator,* 609 F.2d 686 (3d Cir. 1979), for the "legislative" regulation analysis. *Buczynski v. General Motors,* 616 F.2d 1238, 1242 (3d Cir. 1980).

Treasury Regulation Section 1.411(a)-4(a) is in fact not a "legislative" regulation at all. Certainly it cannot take on that character, as distinguished from a conventional "interpretative" regulation, merely by reliance on Section 3002(c) of ERISA, 29 U.S.C. 1202(c).

Section 3002(c) of ERISA, 29 U.S.C. 1202(c), on which the Third Circuit relied, simply makes certain interpretative regulations of Treasury binding on the Secretary of Labor. It in no way purports to delegate "legislative" power to Treasury, especially since Congress has itself specifically defined the term "nonforfeitable" in ERISA Section 3(19), 29 U.S.C. 1002(19). Much less does it purport to permit only token judicial review of Treasury regulations, the effect which the Third Circuit ascribed to the Regulation in abdication of the Court's own responsibilities.[20]

29 U.S.C. 1202(c) was simply intended to allocate administrative responsibilities between the Labor and Treasury Departments as to matters otherwise within their concurrent jurisdiction, obviously to avoid duplicate and possibly inconsistent regulation. Section 1202(c) was not designed to give the Treasury power to modify Congressional definitions of "nonforfeitability" in Section 203 and

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20. That conclusion, of limited judicial review, is particularly ironic in that in ERISA Congress for the first time provided an effective avenue for judicial review of IRS determinations on matters relating to a plan's qualification, both for employees (who previously had no remedy whatsoever) and employers (who had only a burdensome method of seeking review), Internal Revenue Code §7476, 26 U.S.C. §7476; *H.R. Rept. 93-779* (Ways and Means Comm.), reprinted in II Legislative History of the Employee Retirement Income Security Act, at 2584, 2693-2695. It strains credulity to believe that Congress intended simultaneously to offer effective judicial review of IRS determinations with the right hand of §7476 of the Tax Code while withdrawing it with the left hand of §3002(c) of ERISA.

3(19) of ERISA, or to preclude meaningful judicial review.

In ERISA, Congress *did* specifically authorize certain legislative regulations, *all of which are superfluous if the lower court is correct as to the effect of §1202(c).* Compare 29 U.S.C. §1002(27) (respecting "present value"); 29 U.S.C. §1002(28) ("normal service cost" and "normal cost"); 29 U.S.C. §1002(29) ("accrued liability"); 29 U.S.C. §1002(30) ("unfunded accrued liability"); and 29 U.S.C. §1002(31) ("advanced funding, actuarial cost method"). Indeed, Congress expressly authorized certain legislative regulations in the same section of ERISA, 203, subsection (a)(3)(B), by expressly authorizing the Secretary of Labor to "prescribe such regulations as may be necessary to carry out the purpose of this subchapter, including regulations with respect to the meaning of the term 'employment.'" Cf. *Batterton v. Francis,* 432 U.S. 416, 419 (1977) (authority to define "unemployment"). These specific authorizations are in marked contrast to Section 3(19), 29 U.S.C. §1002(19), defining "nonforfeitability" clearly and completely.

It is inconceivable that Congress would have created the rule of nonforfeiture and at the same time have left it to the Internal Revenue Service to determine what offsets or reductions would be permissible. One need only look at the legislative history and purpose of ERISA to realize the absurdity of such a contention.

The Third Circuit has simply fallen prey to the attempts of the IRS[21] to bootstrap its authority by the

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21. We doubt that appellees would be as willing in other matters expediently to accord the IRS the invulnerability to judicial review which it seeks in this matter. It is, after all, employers who do the bulk of battle with the IRS on pension matters.

commingling of "legislative" and "interpretative" regulations in its publications, see, *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir., 1974); *American President Lines v. Federal Maritime Comm'n.*, 316 F.2d 419, 422 n.5 (D.C. Cir., 1963) (per Burger, J.). The intent of §3002(c) was simply to accord primacy to the IRS over the Department of Labor in certain initial interpretations of a statute over which both possessed enforcement responsibility and implicit interpretative power, see *American President Lines v. Federal Maritime Comm'n., supra*, 316 F.2d at 422 n.5. A further intent to give the IRS primary authority over the *courts* in interpreting the statute can*not* be found in the provision.

2. In any event, Treasury's administrative interpretations are contrary to law and provide no rational basis for concluding that offsets of Worker's Compensation for personal injury against an employee's normal age and service retirement benefits is a permissible form of "integrating" and "correlating" retirement benefits.

In any event, the distinction between "legislative" and "interpretative" regulations is irrelevant. As noted in both of Judge Garth's decisions, *Baker v. Otis Elevator*, 609 F.2d 686 (3d Cir., 1979) and the decision herein, a legislative regulation may be invalidated for "a clear and manifest conflict with the governing statute." 616 F.2d at 1243. The supposed administrative approval of worker's compensation offsets plainly falls into that category.

Defendants' analysis is essentially as follows: In 1942, 32 years prior to ERISA, Congress enacted Section 401(a)(5) of the Internal Revenue Code. Section 401(a)(5) provides:

> ". . . Neither shall a plan be considered discriminatory . . . merely because the contributions or benefits . . . differ because of any *retirement* benefits created under State or Federal law." (Emphasis supplied).

Then, in 1968, 26 years after Congress created the language set forth above and 6 years prior to the enactment of ERISA, a lawyer for the agency issued "his opinion" in the form of a revenue ruling, not a regulation, that the words "retirement benefits created under State or Federal law" included worker's compensation benefits. Revenue Ruling 68-243, I.R.B. 1968-21. The opinion was wrong from the outset; was issued without any possible attention to ERISA's non-forfeitability requirements and was invulnerable to judicial review until ERISA. Defendants nonetheless assert that later boilerplate references to the pre-ERISA ruling combined with a Treasury "regulation" have successfully amended the statute to add the anti-discrimination exception of Section 401(a)(5) to the Congressionally mandated definition of non-forfeitability.

The decision of the Third Circuit below accepting these claims violated the settled principle that "[t]he deference owed to an [administrative agency] cannot be allowed to slip into a judicial inertia." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Treasury's own recent admission of its ". . . limited knowledge of worker's compensation,"[23] confirms the fact, evident from the rulings themselves, that Treasury simply was not aware of the issues with respect to worker's compensation offsets.

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23. Statement of Daniel R. Halperin, Acting Deputy Assistant Secretary (Tax Legislation), Senate Finance Comm., Subcommittee on Labor of the Senate Human Resources Committee Subcommittee on Private Pension Plans and Employee Fringe Benefits, 95th Cong., 2d Sess. (August 15, 1978).

The plain fact is that Treasury's apparent practice and present assertions that worker's compensation offsets against normal retirement benefits are permissible simply cannot be accepted because: (1) the practice is not even supported by the agency's formal published rulings; (2) Treasury has no basis for amending the statute to add the anti-discrimination exceptions in 401(a)(5) for "integration" of retirement benefits under State or Federal law to Congress' list of exceptions to the mandatory minimum nonforfeitability standards separately expressed in ERISA §203 and §411 of the Tax Code; and (3) Treasury's further conclusion that worker's compensation benefits are "retirement" benefits is simply not a rational nor a reasoned conclusion.

The most striking flaw in the continuing assertions of reliance on a complex constellation of regulations and rulings cited by the defendants in these cases is that—despite its admitted lack of understanding of worker's compensation programs—Treasury has never once stated in a published ruling or regulation that worker's compensation benefits can be offset against normal age and service retirement benefits. The supposedly dispositive and "legislative" Regulation 1.411(a)-4(a) speaks only of retirement "... benefits which are provided under the Social Security Act or under any other Federal or State law . . .",[24] and never says a word about worker's compensation. Revenue Ruling 68-243, *supra*, does talk about worker's compensation offsets but it is completely silent as to the type of pension plan benefits they can be offset against. Revenue Rul-

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24. The word "retirement" found in §401(a)(5) of the I.R.C. upon which Treasury assertedly based its regulation, was omitted from the text of the Regulation but both the government and appellees admit that this crucial word must be considered a part of the Regulation. The implications of the omission are addressed later.

ing 78-178, I.R.B. 1978-20, pp. 9-10, only incidentally recites Revenue Ruling 68-243 to distinguish it away by suggesting that worker's compensation is analogous to a "disability" pension and thus might be used to establish an "integrated and correlated retirement system" under applicable regulations (namely Treasury Regulation 1.401-4 (b)). The most natural reading of the actual rulings is simply that offsets of worker's compensation benefits against *disability* pensions are permissible because of their common "correlated" origin in a worker's physical injury or disease.[25] Any contention that the rulings reach farther to allow offsets against a *normal* pension is patently contrary, under Treasury's own analogies, to the Congressional mandate in 3(22) of ERISA, 29 U.S.C. 1002(22) that "the normal retirement benefit shall be determined without regard to . . . (B) disability benefits. . ."

The second premise of the argument for deference to the administrative interpretations assumes that Treasury has the power to amend the statute by adding the anti-discrimination exceptions of Code §401(a)(5) as an unlimited and unrestricted addition to the narrow list of non-forfeitability exceptions prescribed by Congress in ERISA §203/IRC §411. The statute does not provide any justification for this wholesale addition to the statute. If Treasury thinks Congress has made a mistake, it can seek a legislative amendment to correct the situation. It cannot amend the statute by regulation to implement its view of proper policy, *Koshland v. Helvering*, 298 U.S. 441, 447 (1936); *General Electric v. Burton*, 372 F.2d 108, 111 (6th Cir. 1967). Treasury's errors on both a theoretical and mechanical level indicate that there is no basis for judicial deference to its supposed "reasoning."

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25. The same seems to us to be the more proper interpretation of rulings on "integration" of social security "disability" benefits as well.

The obvious theoretical mistake is that Treasury fails to understand that the relationship between the anti-discrimination requirements of §401 of the Code and the vesting requirements of ERISA §203/IRC §411 is not a two-way street. Section 203 imposes mandatory minimum standards for all pension plans on a general basis regardless of the factual circumstances of a plan. Section 401 gives the IRS authority to impose even *more stringent* standards on a case-by-case basis, *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4730. It does not give Treasury the power to waive the minimum standards of §203 on either a general or a case-by-case basis.[26]

The other obvious error, the omission of the critical word "retirement" in the regulation, is the understandable product of a mind-set which considers pensions a simple pay-off to placate the older worker for his lost wages when he is removed from the workplace. From that viewpoint, there is no difference between retirement benefits and other collateral sources which allow the nation's elderly to pay for their food, clothing, and shelter, so that "integration" of any of these sources of income is proper. Several of the defendants in these cases share this viewpoint. Congress does not. Congress has taken the quite different position that pensions represent deferred wages which should not be affected by payments attributed to events or losses after the wages have been earned by the completion of age or service requirements. A "regulation" issued without apparent reasoned consideration of this important policy and its implications is void. *Permian Basin Area Rate*

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26. The statute does give the Department of Labor power to waive the requirements of §203 in certain circumstances, ERISA §§203(a)(3)(C), 302(c)(8), 29 U.S.C. 1053(a)(3)(C), 1082(c)(8). This negates an implied power of waiver on the part of Treasury.

Cases, 390 U.S. 747, 792 (1968); *Greater Boston Television Corporation v. Federal Trade Comm'n*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1971).

The final item militating against deference to the administrative interpretations is that Treasury has ignored not only the controlling Congressional philosophy of pensions—but also the controlling philosophy of Congress and the state legislatures which considers worker's compensation not a simple welfare benefit to cover lost wages, but instead, a direct replacement for common law tort damages to compensate for personal injury and its consequences with payments for loss of bodily members and medical benefits as well as lost future earnings *capacity* (a concept to be carefully distinguished from actual wage-loss).[27] Treasury simply does not have the authority to ignore the binding determinations of Congress and the states as to the nature, operation, and effect of worker's compensation, *Koshland v. Helvering*, 298 U.S. 441, 447 (1936); *Biddle v. Comm'r of Internal Revenue*, 302 U.S. 573, 582 (1937); *O'Neill v. United States*, 410 F.2d 888 (6th Cir. 1969). The evidence that it has nonetheless done so is apparent from the very face of the Treasury's published rulings.

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27. Congressional acceptance of the general proposition that worker's compensation is analogous to personal injury damages rather than retirement pensions is evident in the Tax Code itself. Sections 103 and 104 of the Code, 26 U.S.C. 103, 104 recognize the analogy in entirely exempting both personal injury damages and worker's compensation from income tax. Retirement income, by contrast, is fully taxable under Code §61(a)(11), 26 U.S.C. 61(a)(11), to the extent not previously taxed in the year contributions were made. The IRS has recognized that these sections reflect a crucial distinction between worker's compensation and normal age and service retirement benefits, I.R.C. Regulation 1.104-1(b), 26 C.F.R. 1.104-1(b); Revenue Ruling 80-14, I.R.B. 1980-2, p. 12 (January 14, 1980); Revenue Ruling 80-44, I.R.B. 1980-8, p. 6 (February 25, 1980).

The evidence begins in Revenue Ruling 68-243 itself. It gave the green light to worker's compensation offsets but simultaneously *dis*allowed offsets of common law tort damages on the ground that an offset of tort damages would allow the employer to pay his own liabilities out of the assets of the pension fund. The only possible explanation for this result (other than complete irrationality) is a lack of awareness that in virtually every state worker's compensation payments are the comprehensive replacement for tort damages and remain a liability of the employer. To put it simply, the force of Rev. Rul. 68-243 "as an aid to the interpretation of the statute is impaired by [this] internal inconsistency," *United States v. Calamaro*, 354 U.S. 351, 359, n.12 (1957), which belies any contention that Treasury engaged in some thorough and comprehensive review of worker's compensation programs to reach a reasoned conclusion allowing worker's compensation offsets.[28]

Treasury's lack of awareness of worker's compensation principles was not its only fault in Revenue Ruling 68-243. It also failed to address the statutory issue under the Tax Code as to the status of worker's compensation benefits as

28. It is possible that the Treasury lawyer rendered his opinion on the sole basis of representations concerning a worker's compensation program in one of the six (6) states which maintain an exclusive and mandatory state insurance fund of worker's compensation benefits and that he confused such a program with governmental insurance programs, such as Social Security, funded through payroll or other taxes. The other forty (40) or more states usually just require that an employer maintain insurance either with a private insurer or an optional state insurance fund or qualify as a self-insurer as larger companies such as defendants generally do. See, generally, Malone, Plant & Little, *The Employment Relation*, 82-83 (1974). If the lawyer did actually render the broadly-based conclusions of Revenue Ruling 68-243 in ignorance of the general practice and without independent investigation, that only serves to confirm the uselessness of the ruling as a careful and persuasive analysis of the issues presented.

"retirement benefits" similar in nature and purpose to normal age and service pensions. Treasury simply decided that any program requiring employer contributions was sufficiently similar to Social Security to allow an offset. A narrow focus on this feature as the sole criterion for defining offsetable benefits—to the exclusion of the requirement that the benefits to be offset also be a "retirement benefit" capable of "integration" and "correlation" with other benefits under the plan—is the only logical explanation for Treasury's apparent action in subsequently approving plans providing for the offsets of worker's compensation against normal age and service pension benefits.[29]

The rationalization that worker's compensation benefits were similar to "disability pension benefits" and "offsetable" on that ground was apparently never even thought of until the preparation of Revenue Ruling 78-178, after cases on this question had been filed, and concurrently with Treasury's preparation of its defense of these cases.[30]

Revenue Ruling 78-178, however, only succeeded in making Treasury's complete lack of understanding of worker's compensation programs more apparent rather than indicating a rational basis for allowing worker's compensation offsets. In holding that governmental unemployment benefits were not permissible offsets to pensions, Treasury incidentally distinguished between benefits for "sickness . . . which include cash benefits and medical services . . ." —which can*not* be offset—and worker's compensation pay-

29. This is also confirmation that Treasury's actions were all along premised on a view which fails to conceive of pensions as deferred wages.

30. The lack of any prior attention to the issue is confirmed by Treasury's failure to notice that it had dropped the crucial word "retirement" from the language of §401(a)(5) in drafting regulation 1.411(a)-4(a).

ments—which supposedly can be offset.[31] Anyone with even minimal knowledge of worker's compensation law can only wonder at the arbitrary dividing line in this distinction.

The IRS seems to have premised its ruling on some distinction between "sickness" and "disability."[32] It apparently reasoned that worker's compensation fell in the latter category on an erroneous assumption that the concept of "disability" for worker's compensation purposes was synonymous with the much narrower concept of total and permanent "disability" utilized in the Social Security Act and in defining the eligibility criteria for a disability pension. The result of that mistake is a guideline based on nothing more than an arbitrary semantic distinction.

The concept of "disability" for purposes of worker's compensation and occupational disease statutes is extremely broad. It generally extends to cover any work-related sickness or injury which causes an employee to incur medical expenses or impairs his ability to earn wages at the same level he enjoyed before the injury. See generally, Malone, Plant & Little, *The Employment Relation*, pp. 371-395 (1974). The "disability" triggering the payments can be either temporary or permanent and need not result in the employee's complete inability to work. *Id.* The benefits provided under the statutes include both cash benefits for loss of earning capacity and/or loss of bodily members and medical benefits to cover expenses

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31. Despite prior regulations, the Revenue Ruling and Treasuries determination letter procedures, the Raybestos Plan still provides for offsets of both "cash sickness" benefits and unemployment insurance benefits, see n.3, *supra*.

32. A better choice might have been to overrule Revenue Ruling 68-243 because of its obvious errors rather than simply trying to distinguish it. That may not have been politic with these cases pending at the time.

incurred in treating the work-related condition. Malone, Plant & Little, *The Employment Relation*, pp. 365-448 (1974).

There is no way that these benefits can rationally be pigeonholed into one or the other of Treasury's categories on a wholesale basis. Worker's compensation laws can plainly provide both cash and medical benefits for conditions which constitute nothing more than simple "sickness" in the common parlance.[33] Worker's compensation (as well as employer-funded sickness and accident or long-term disability insurance), can, of course, also be triggered by conditions which become so serious as to render the employee completely incapable of any type of further work so as to bring him within the much more stringent definition of "disability" for purposes of the Social Security Act and the eligibility criteria for a qualified disability pension. 42 U.S.C. 423(d); Revenue Ruling 69-5 § 3.01, C.B. 1969-1, p. 125. The point is not that there is no connection between worker's compensation and "disability." It is simply that the semantic line drawn in Revenue Ruling 78-178 between "sickness" and "disability" provides no rational basis for concluding that worker's compensation is a form of "retirement benefit" which can be offset against any type of pension benefit.

The Third Circuit assumed rational analysis on the part of Treasury that (1) worker's compensation benefits are "retirement benefits" because they are similar to a "disability" pension, and (2) that this status as a "retirement benefit" allows their offset against not merely "disability" pensions, but also normal age and service benefits. The rulings do not rationally support these conclusions.

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33. This is particularly apparent in the case of benefits under an occupational disease statute.

The bottom line is that the IRS never had and evidently still does not have an adequate understanding of the theory, operation, effects, and benefits of worker's compensation programs. It clearly did not realize, when it issued Revenue Ruling 68-243 that worker's compensation benefits are a direct obligation of the employer which replaces the employee's common law tort action for damages. It apparently did not understand when it issued Revenue Ruling 78-178, some ten (10) years later, the broad concept of "disability" in worker's compensation or the fact that worker's compensation pays both cash and medical benefits. In all the twelve (12) years since the initial ruling, Treasury has never once come to grips with the issues presented by, among other things, offsets of medical benefits, specific loss payments, settlements, and attorneys' fees incurred in collecting benefits—in marked contrast to its complex rules on "integration" of Social Security benefits. It simply never realized that these problems and issues existed until these cases arose.

The suggestion is implicit in the decision below that agency lawyers drafting isolated revenue rulings in this informational void somehow 1) made a carefully reasoned analysis of ERISA (even before it was enacted) and of worker's compensation and occupational disease statutes throughout the country; and 2) concluded that the operation and purposes of such statutes justified an unlimited offset of benefits under a worker's compensation program against any type of benefits under a pension plan. The suggestion would be amusing were it not for the harsh consequences visited on injured workers.

3. Congressional approval of Social Security old-age benefits offsets demonstrates no intent to make a further implied exception for unlimited worker's compensation offsets.

Defendants and the Court below assert that Congress' failure to make Social Security integration, concededly permitted, a specific exception to §203(a) and I.R.C. §411, demonstrates that the nonforfeitability exceptions set forth in §203(a)(3) are not exclusive. From this premise, they leap to the illogical conclusion that therefore worker's compensation offsets are permissible without attention to either the statute or the significant differences beween the two types of benefits and offsets.

The decision below criticizes plaintiffs for failing to recognize, per the court, that ". . . the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits . . .", *Buczynski v. General Motors, supra,* 616 F.2d at 1246, (emphasis by the Court), so as to make ". . . any purported distinction between the Social Security offset and the Worker's Compensation offset meaningless . . .", *id.* With all respect, it is the court which erred in overlooking at least two major statutory facts: (1) that Social Security "disability" benefits terminate at age 65, 42 U.S.C. 423 (a)(1)(B), 42 U.S.C. 402(a)(3), so that it does not follow "perforce" that Congressional approval of Social Security offsets contemplated offsets of "disability" benefits against normal age and service benefits; and (2) the "normal retirement benefit" guaranteed in §3(22) of ERISA itself, 29 U.S.C. 1002(22), explicitly provides that "[t]he normal retirement benefit shall be determined without regard to . . . (B) disability benefits. . . ." These statutory provisions plainly indicate that any rationale, by either the Court

below or Treasury, for allowing offsets of worker's compensation benefits against an employee's "normal retirement benefit" is contrary to law.

The Court's implicit premise, that Social Security offsets must fall within the statute's prohibition of forfeitures if worker's compensation offsets would, similarly is not true. ERISA §203(a), 29 U.S.C. 1053(a), requires that the normal retirement benefit be "nonforfeitable upon the attainment of normal retirement age." The Congressionally authorized offset of Social Security *old-age* benefits is frozen at retirement (if not already frozen by earlier separation from service, ERISA §206(b), 29 U.S.C. §1056(b); I.R.C. §401(a)(15), 26 U.S.C. §401(a)(15)). The Social Security offset thus does not violate the statute by reducing benefits after normal retirement. Worker's compensation offsets do.

The other problem with this argument is that it moves from the specific to the general—a logical fallacy. Acceptance of this fallacy opens Pandora's box. Taken to its logical conclusion, since Social Security is not mentioned, all which is not expressly prohibited is permitted. Therefore, any offset against vested pension benefits is permissible so long as care is taken to phrase the forfeiture in terms of an offset. Obviously such a syllogism completely destroys §203(a) of ERISA and the concepts of vesting and nonforfeitability as the exception swallows the rule.

For example, under this same reasoning, offsets, reductions, and suspensions of pension benefits to persons who work for competitors or who otherwise violate "bad boy" clauses would be permissible notwithstanding clear Congressional prohibition under ERISA's broad nonforfeitability rules and in the legislative history, *H.R. Rept. 93-807* (Ways and Means Committee, 93d Cong., 1st Sess.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670,

4725-4726; *S. Rept. 93-383* (Finance Committee, 93d Cong., 1st Sess.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4890, 4934-4935; *Accord: Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307, 311 (8th Cir. 1979). Compare Revenue Ruling 71-92, I.R.B. 71-7 ("misconduct" forfeiture provision does not disqualify plan, even though "misconduct" not defined, so long as evenly applied). All that would be needed would be ingenious drafting to revise the plan to "offset" any earnings or profits in competitive employment, or of kickbacks, or other arguably undeserved remuneration received on account of other "disloyalty" to the sponsor of the pension plan. Congress plainly intended it to be more difficult than that to evade ERISA.

Finally, the situation of Social Security offsets is unique and simply proves nothing whatsoever with respect to worker's compensation offsets. Social Security offsets are explicitly and directly authorized in §204(b) and §206(b) of ERISA, 29 U.S.C. §1054(b) and §1056(b)—enacted at the same time and as part of the very same subtitle as §203—reflecting, after long Congressional debate, Congressional acquiescence in integration of Social Security benefits as a financially necessary support of the pension system. See, *H.R. Rept. 93-807* (Ways & Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4695-4696; and Supplemental Views of Representatives Corman & Gibbons, reprinted in [1974] U.S. Code Cong. & Adm. News at 4833, 4835-4837.[34] There is, moreover, little

34. Defendants consistently fail to take note of this specific Congressional consideration of Social Security offsets in the context of ERISA itself. They also consistently overlook the fact that the Tax Code language on Social Security offsets is in a new section, Section 401(a)(15) of the Internal Revenue Code—which says not a single word about worker's compensation nor even about "retirement benefits ... under State ... law"—not Section 401(a)(5) on which defendants rely. The new provision's relationship to the other provisions of ERISA's vesting requirements is the result of lengthy development in both the labor and tax-oriented versions of the bills leading to ERISA, see, *H.R. 9824 (As Introduced)*, re-

in Social Security offsets which interferes with anyone's expectancies because they are widely publicized and are calculable at any point in time.

This contrasts markedly with worker's compensation offsets, whose alleged statutory authorization lies only in Treasury's erroneous assertion that they fall into the separate pre-ERISA anti-discrimination exception for "retirement benefits . . . under State law." They fall unexpectedly on a worker in his later years to deprive him of his pension.

II. Congress has expressly saved New Jersey's Worker's Compensation law from pre-emption by ERISA.

The second issue in this case is whether Congress intended to pre-empt New Jersey's worker's compensation law and, at least in the circumstances of this case, to leave workers without any remedy for work-related injury. The issue concerns a recent modification of the anti-assignment clause in the New Jersey worker's compensation law to provide that:

> "34:15-29. *Compensation preferential lien; claim not assignable; set offs*
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> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed

printed in I Legislative History of the Employee Retirement Income Security Act, 695, 749-750 (hereafter, "ELH"); *H.R. 2 (As Reported from H Educ & Labor Comm)*, II ELH, 2251-2252, 2310. *H.R. 12481 (As Reported from H. Ways & Means)*, II ELH, 2407; *H.R. 12855 (As Introduced)*, II ELH 2936-2937, 3002; *H.R. 2 (H.R. 12906) (As Introduced)*, II ELH 2772, 2843; *H.R. 2 (As passed by the House)*, III ELH 3909, 3980-3981. *H.R. 2 (As Reported from Conference)*, III ELH 4286, 4309, 4320. See also: *Caterpillar Tractor v. Comm'r of Internal Revenue*, 72 T. C. No. 89, 1979 C.C.H. T.C. Reg. Dec. ¶36,316, 260 B.N.A. Pens Reptr. D-6 (Tax Ct. 1979).

> by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*"

N.J.S.A. §34:15-29, as amended by L. 1977, c. 156 Section 1, eff. July 14, 1977. (Emphasis added). The Third Circuit held the provision pre-empted by ERISA. Its conclusion in fact violates Congressional intent that ERISA not affect state worker's compensation and insurance laws [35] and, once again, its analysis puts form before substance.

The core of the conflict revolves around the tension between the broad pre-emption of provisions of ERISA §514(a), 29 U.S.C. 1144(a), and the equally strong and opposite provisions—not mentioned in the Court's opinion —rendering ERISA and its pre-emption provision inapplicable to state worker's compensation and insurance laws. ERISA §§4(b)(3), 514(b), 29 U.S.C. 1003(b)(3), 1144 (b); *H.R. Rept. 93-1280* (Conf. Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 5038, 5162. The tension is one which must be resolved by analysis of Congressional intent and policies.

Worker's compensation programs are among the most historically safeguarded of state responsibilities, reflecting careful legislative compromises between the employee's

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35. Worker's compensation benefits are typically provided through compulsory coverage with an independent insurance carrier. The particular defendants in these cases, Raybestos Manhattan, Inc. and General Motors, are both financially sound enough to qualify as "self-insurers" under a special provision of New Jersey law. See generally, Malone, Plant & Little, *The Employment Relation*, p. 83 (1974).

need for compensation, the employer's need for a fixed and determinable liability, and the public need to encourage economic growth while simultaneously providing incentives to employers to protect their workers' health and safety. The delicate nature and result of such legislative compromise has led the courts to accord broad deference to the states in this area. As the Court stated in *DeCanas v. Bica*, 424 U.S. 351, 356 (1976):

> "States possess broad authority under their police powers to regulate the employment relationship and to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and *workmans' compensation laws are only a few examples.*" (Emphasis supplied)

Congress reinforced this "hands-off" policy by its express exemption of worker's compensation programs from ERISA.

Congress did, on the other hand, plainly intend to give broad pre-emptive effect to ERISA over state laws "relating to" employee benefit plans in order, among other things, to allow the plans of multi-state employers to be administered on a uniform basis across the country. That purpose is not advanced by pre-empting the provisions of a state worker's compensation law.

It is apparent as a general matter that the operation and effect of a worker's compensation offset necessarily and inevitably varies with the provisions of state worker's compensation laws. It is state law which determines whether any worker's compensation benefits are payable in the first place. It is state law which may determine whether the offset is applicable in the first place in the case of plans—such as that of defendant General Motors in the

consolidated case—which do not offset all types of worker's compensation benefits and as to which state law will vary in determining whether one or another type of benefit is payable.[36] It is state law which determines whether worker's compensation is an employee's exclusive remedy for personal injury in the workplace—thereby forcing him to the choice between taking his pension at the expense of worker's compensation or vice versa—or whether he will be allowed to sue at common law—thereby to attempt to preserve both his pension and his right of compensation for personal injury. It is, finally, state law which determines the amount of worker's compensation and thus the amount of any offset. Neither the language nor the policies of the basic pre-emption clause in ERISA would be served by overriding the explicit Congressional protection of state law determinations thus made or the state clause of present concern prohibiting assignment of worker's compensation benefits.

The Court of Appeals decided the pre-emption issue in a literal reading of the phrase in ERISA pre-empting state statutes that "relate to any employee benefit plan." 29 U.S.C. 1144(a). But the issue of pre-emption is not simply one of semantics. If it were, the New Jersey legislature need only put its prohibition in different terms in order to preserve the effectiveness of its worker's compensation program.

For example, it could simply convert the form of worker's compensation benefits for retirees to the format of common law tort damages and thus—at least, under present rules—enact the very same prohibition without any interference. It could alternatively simply increase the

36. An example is the exception in the General Motors Plan for schedule injury benefits "specifically allocated for ... fixed statutory payments for loss of any bodily member." See generally, 2 Larsen, *Worker's Compensation Law*, ¶¶58.00-58.40.

worker's compensation benefits payable to counter any pension plan offset. In neither event could any complaint of pre-emption be raised under any "dictionary" test of ERISA, because the prohibition, although the same in effect, would only talk about the terms for worker's compensation benefits, not pensions.

The situation here cannot rationally be distinguished from that of employee benefit plans providing benefits through other sorts of insurance in which the ERISA-exempt insurance contract remains subject to state law. See, e.g., *Wayne Chemical v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir., 1977); *Eversole v. Metropolitan Life Ins.*, —— F. Supp. ——, 318 B.N.A. Pens. Rptr. D-8 (C.D. Calif., 1980); see also, *Cate v. Blue Cross*, 434 F. Supp. 1187 (E.D. Tenn., 1977).

Consider, by way of example, the absurdity of distinguishing between the applicabilty of the New Jersey statute to a pension plan which provides benefits through ERISA-exempt insurance company annuities and one which does not. The one funded through annuities would clearly remain subject to the state probibition on offsets in the drafting of any "coordination of benefits" clause in the insurance contract, ERISA, §514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A), while the other would not under the Third Circuit's mechanical view of pre-emption. ERISA's purpose to protect state worker's compensation programs and insurance regulation is simply dominant over the otherwise generalized pre-emption clause of the statute, whose purposes cannot be served in the circumstances.

Finally, it must be said that the New Jersey Legislature's command is consistent with ERISA. It is consistent not only with Section 203(a), but with ERISA's own purpose to insure pension benefits against loss through as-

signment or alienation for the benefit of a third-party; namely, the employer, ERISA, §206(d), 29 U.S.C. 1056 (d). It is perhaps, the concept of "integration" which the IRS would have reached if it had demonstrated any expertise in worker's compensation when it started approving the offsets contained in these plans. It is, finally, New Jersey's sovereign exercise of its statutorily protected right to maintain and enforce its own proper view of the balance of interests to be made in worker's compensation programs.

ERISA gives employee benefit plans the right to run their affairs in accordance with uniform federal regulations free from state taxes, or other regulations to complicate their internal operation. It does not make employee benefit plans a vehicle to allow the employer to exempt himself from the requirements of traditional state programs—such as worker's compensation and insurance laws—whose continuation, effectiveness, and enforceability are expressly saved in the statute.

CONCLUSION

It is incontestable that Congress indicated its intent in ERISA to consider pensions as deferred wages not subject to loss for any reason—even as to healthy workers who become re-employed at wages exceeding their benefits and as to employees who steal from or cheat their employers for more than the value of their pension benefits.

Could Congress have rationally intended that the honest, disabled worker, who loyally toils for his employer throughout his lifetime until suffering a work-related injury, would be less favorably treated and would be forced to suffer a loss of the pension he had already fully earned before suffering such injury?

We submit not. The decision of the Third Circuit should be reversed and the Judgment of the District Court should be reinstated.

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STATUTORY APPENDIX

United States Constitution, Article VI, cl. 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

26 U.S.C. §401(a)(5).

> (5) A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b) (without regard to paragraph (1)(A) thereof) merely because it excludes employees the whole of whose remuneration constitutes "wages" under section 3121(a)(1) (relating to the Federal Insurance Contributions Act) or merely because it is limited to salaried or clerical employees. Neither shall a plan be considered discriminatory within the meaning of such provisions merely because the contributions or benefits of or on behalf of the employees under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, or merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from "wages" by section 3121(a)(1) differ from the contributions or benefits based on employee's remuneration not so excluded, or differ because of any retirement benefits created under State or Federal law. For purposes of this paragraph and paragraph (10), the total compensation of an individual who is an employee within

the meaning of subsection (c)(1) means such individual's earned income (as defined in subsection (c)(2)), and the basic or regular rate of compensation of such an individual shall be determined, under regulations prescribed by the Secretary, with respect to that portion of his earned income which bears the same ratio to his earned income as the basic or regular compensation of the employees under the plan bears to the total compensation of such employees. For purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the amount of contributions on behalf of the employees allowed as a deduction under section 404 for the taxable year with respect to such plans, taken together, bears a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate. For the purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take account of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates. For purposes of determining whether one or more plans of an employer satisfy the requirements of paragraph (4) and of sec-

tion 410(b), an employer may take into account all simplified employee pensions to which only the employer contributes.

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

29 U.S.C. §1002(22)

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall

be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

29 U.S.C. §1053(a)

§1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additonal year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this titie.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

29 U.S.C. §1056(b)

Decrease in plan benefits by reason of increases in benefit levels under Social Security Act or Railroad Retirement Act of 1937

(b) If–

(1) a participant or beneficiary is receiving benefits under a pension plan, or

(2) a participant is separated from the service and has nonforfeitable rights to benefits,

a plan may not decrease benefits of such a participant by reason of any increase in the benefit levels payable

under title II of the Social Security Act or the Railroad Retirement Act of 1937, or any increase in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation.

29 U.S.C. §1144.

§1144. Other laws

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company

or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or super-

sede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. §1202(c).

(c) Regulations proscribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter 1 of this chapter which include 29 U.S.C. §1053(a). Except as otherwise provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

N.J.S.A. §34:15-29.

34:15-29. Compensation preferential lien; claim not assignable; set offs

The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. The right of compensation granted by this chapter may be set off against disability pension benefits or pay-

ments but shall not be set off against employees' retirement pension benefits or payments.

26 C.F.R. §1.411(a)-4(a)

§1.411(a)-4 Forfeitures, suspensions, etc.

(a) Nonforfeitability. Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time. Certain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable. Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation. Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account

in determining plan benefits. To the extent that rights are not required to be nonforfeitable to satisfy the minimum vesting standards, or the nondiscrimination requirements of section 401(a)(4), they may be forfeited without regard to the limitations on forfeitability required by this section. The right of an employee to repurchase his accrued benefit for example under section 411(a)(3)(D), is an example of a right which is required to satisfy such standards. Accordingly, such a right is subject to the limitations on forfeitability. Rights which are required to be prospectively nonforfeitable under the vesting standards are nonforfeitable and may not be forfeited until it is determined that such rights are, in fact, in excess of the vesting standards. Thus, employees have a right to vest in the accrued benefits if they continue in employment of employers maintaining the plan unless a forfeitable event recognized by section 411 occurs. For example, if a plan covered employees in Division A of Corporation X under a plan utilizing a 10-year-100 percent vesting schedule, the plan could not forfeit employees' rights on account of their moving to service in Division B or Corporation X prior to completion of 10 years of service even though employees are not vested at that time.

Revenue Ruling 78-178:

Advice has been requested whether unemployment compensation benefits constitute "retirement benefits created under State or Federal law" within the meaning of section 401(a)(5) of the Internal Revenue Code of 1954, and may therefore be used as an acceptable offset against benefits under a pension plan qualified under section 401(a) of the Code.

Section 401(a)(5) provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.

Section 1.401-4(b) of the Income Tax Regulations limits the State or Federal programs that may be used as an offset so that the total benefits resulting under the plan and under the program must establish an integrated and correlated retirement system satisfying the tests of section 401(a).

Revenue Ruling 68-243, 1968-1 C.B. 157, provides that benefits from programs that require employer contributions and make benefits available to the general public may be offset against benefits under a qualified pension plan.

Unemployment compensation laws do require employer contributions and are available to the general public. The issue is whether unemployment compensation benefits together with qualified pension plan benefits establish an integrated and correlated retirement system. There are many types of benefits under public programs that do not lend themselves to integration with private pension plan benefits. Thus a correlated retirement system could not exist. Only those programs which provide benefits that may be provided under a qualified pension plan may be used as an offset since only then could a correlated retirement system exist. For example, the benefits payable under State or Federal programs because of sickness and maternity, and which include cash benefits and medical services, may not be used as an offset to pension plan benefits because such benefits may not

be provided under a qualified pension plan. See section 1.401-1(b)(1)(i) of the regulations.

Unemployment compensation benefits are paid for temporary periods of layoff. Under section 1.401-1(b)(1)(i) of the regulations, a qualified pension plan may not provide layoff benefits. Consequently unemployment compensation falls into the broad category of State and Federal programs that may not be used as an offset to qualified pension plan benefits since such type of benefits may not be provided under a qualified pension plan.

Revenue Ruling 68-243 allows the offsetting of pension plan benefits by the benefits payable under workmen's compensation laws and other occupational diseases laws. These benefits are payable upon an employee's disablement. Section 1.401-1(b)(1)(i) of the regulations specifically allows the payment of pension plan benefits upon disability. Therefore these programs may be used as an offset to plan benefits. Because workmen's compensation laws are distinguishable from unemployment compensation laws, Revenue Ruling 68-243 should not be construed as allowing an offset for unemployment compensation benefits.

This Revenue Ruling is effective on the first day of the first plan year commencing after December 31, 1978.

In the case of a person employed at any time by the employer on or after the effective date of this Revenue Ruling, the offset for unemployment compensation benefits may not be applied on or after the first date after such effective date on which such person is so employed. In the case of a person who leaves the employ of the employer before such effec-

tive date and who is not reemployed by the employer on or after such effective date, such offset may be applied to reduce such person's benefits.

Revenue Ruling 68-243.

Advice has been requested whether "public disability benefits" as defined in the plan described below constitute "retirement benefits created under State or Federal law" within the meaning of section 401(a)(5) of the Internal Revenue Code of 1954 and are acceptable offsets against benefits under a qualified employees' pension plan.

An employer established a pension plan that was intended to qualify under section 401(a) of the Code. The plan provides that benefits thereunder will be offset by public disability benefits. The term "public disability benefits" is defined in the pension plan as including (1) disability payments under any workmen's compensation law or occupational diseases law (except fixed statutory payments for the loss of any bodily member) or (2) any disability damages recovered from the employer under common law.

Section 401(a)(5) of the Code provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.

The effect of section 401(a)(5) of the Code is to permit total benefits, inclusive of those provided under the social security or similar program, to be used for comparative purposes. See Part 4(j) of Revenue Ruling 65-178, C.B. 1965-2, 94. A program, like the Social Security program, that requires employer contributions and makes benefits available to the general

public is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.

Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.

Since the benefits payable under a workmen's compensation law or occupational diseases law are available to the general public, it is held that benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer.